

**Seyedmohsen Namazivaj Seyedreza v Public Prosecutor and
other appeals**

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL
NOS P-05(M)-577-12 OF 2019, P-05(M)-595-12 OF 2019 AND
P-05(M)-609-12-12 OF 2019
HADHARIAH SYED ISMAIL, AHMAD ZAIDI IBRAHIM AND AZMI
ARIFFIN JJCA
26 JANUARY 2024

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Criminal Procedure — Trafficking in dangerous drugs — ‘Manufacturing’ as act of trafficking — Appellants charged under s 39B(1)(c) of Dangerous Drugs Act 1952 (‘DDA’) — Charge against appellants amended to one under s 39B(1)(a) of DDA — Trial judge convicted appellants under s 39B(1)(a) of DDA — Trial judge sentenced appellants to death — Whether trial judge erred in amending charge proffered against appellants — Whether trial judge erred in finding appellants guilty of offence of drug trafficking by way of manufacturing without first making affirmative finding of possession — Whether trial judge erred in hastily dismissing appellants’ defence without having accorded maximum evaluation and adequate judicial appreciation to it — Whether trial judge erred in finding there was common intention between appellants — Whether trial judge erred in convicting appellants based upon inadmissible evidence — Whether death sentence imposed by trial judge proportionate — Abolition of Mandatory Death Penalty Act 2023 — Criminal Procedure Code s 172B(2)(vi) — Dangerous Drugs Act 1952 ss 2, 37, 39B(1)(a) & (c) — Penal Code s 34

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There were initially four accused in the court below who were charged under s 39B(1)(c) of the Dangerous Drugs Act 1952 (‘the DDA’) read with s 34 of the Penal Code for the offence of doing an act preparatory to or for the purpose of trafficking in dangerous drugs. The prosecution’s case was based on the evidence of the police personnels who had raided a premise located in the district of Seberang Perai Tengah, Penang which was used by the accused persons to manufacture the dangerous drugs methamphetamine. In this regard, the first, second and third accused were arrested when they were engaging in the act of manufacturing the said drugs. At the end of the prosecution’s case, the learned trial judge found that a prima facie case of trafficking by way of manufacturing was established against all the accused and amended the charge to one of an offence under s 39B(1)(a) of the DDA. The four accused were called upon to enter their defence on the amended charge. The defence of each of the four accused persons were as followed: (a) the first accused sought to shift the blame to one Hariran who had rented the first floor of the premise from the first accused and the first accused contended that he was a legitimate businessman selling gloves whilst the second and third accused

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A were his customers; (b) the second and third accused contended that they came to Malaysia to purchase gloves from the first accused; and (c) the fourth accused testified that she was hired by the first accused to clean up the ground floor of the premise and she had never gone up to the first floor. At the end of the case, the learned trial judge acquitted and discharged the fourth accused for having
B successfully raised a reasonable doubt in the prosecution's case whereas the first, second and third accused ('the appellants') were convicted and sentenced to death, hence, the present appeals. The grounds of appeal raised were that the learned trial judge erred in law and fact: (i) in amending the charge proffered against the appellants from one under s 39B(1)(c) of the DDA to one under
C s 39B(1)(a) of the same Act at the end of the prosecution's case; (ii) in finding the appellants guilty of an offence of drug trafficking by way of manufacturing under s 39B(1)(a) of the DDA without first making an affirmative finding of possession; (iii) in hastily dismissing the appellants' defence without having
D accorded maximum evaluation and adequate judicial appreciation to it; (iv) in finding there was a common intention between the appellants to commit an offence of drug trafficking under s 39B(1)(a) of the DDA; and (v) when His Lordship convicted the appellants based upon inadmissible evidence, ie, exhibits which were not identified nor marked in His Lordship's presence — in this regard, the appellants argued that the exhibits identified and marked before
E the learned senior assistant registrar in the absence of the learned trial judge was a procedure not provided under s 172B of the Criminal Procedure Code ('the CPC'), as such, such exhibits were said to be inadmissible due to its clear contravention of s 172B(2)(vi) of the CPC.

F **Held**, dismissing the appeals:

(1) Based on the notes of proceedings, the learned trial judge had clearly stated that he would be present for the case management on 18 February 2019 and 19 February 2019, but the notes of proceedings did not show what transpired during the case management. Thus, it would not be
G correct for the court to assume that the learned trial judge was not present on these two dates as submitted by learned counsels. Be that as it may, from the court's examination of all the exhibits tendered in court, the court found that it was exactly the same exhibits that were seized from the premises. The court opined that the identity of the drugs and the unbroken chain of evidence were never in doubt. The chemist (SP4) had also identified each exhibit during the trial before the learned trial judge. On totality, the court found that the complaint regarding the exhibits which were not properly identified nor marked in the learned trial judge's
H presence had been over-emphasised, truly unacceptable, and merely an afterthought. Neither there were serious infirmities that had caused any prejudice or occasioned miscarriage of justice to all the accused. Hence, learned counsels' complaint on this ground of appeal was bereft of any
I merit (see paras 21–22 & 25).

- (2) The act of manufacturing did not require the act of possession to be proved in order to constitute trafficking in s 2 of the DDA. Thus, the prosecution could rely primarily on direct evidence of trafficking to prove their case against the accused on the amended charge as there were no presumptions in s 37 of the DDA thereof to facilitate proof of that fact or the requirement to prove the existence of possession. Therefore, the learned trial judge had not committed any appealable error in his decision for failing to make a definite finding of possession when he ordered the accused to enter their defence on the amended charge, hence, this ground of appeal too had no merits. Upon evaluating the entire evidence, the court was satisfied that the appellants had failed to exonerate themselves from their involvement in the trafficking of the impugned drugs (see paras 29, 31 & 37). A B C
- (3) The Federal Court in *Chan Wei Loon v Public Prosecutor and another appeal* [2021] 4 MLJ 660 ('*Chan Wei Loon's case*') had acknowledged that possession could be relevant in some manufacturing cases while not in others. The Federal Court held that there had been an exception for manufacturing cases as decided in *Lee Boon Siah & Ors v Public Prosecutor and other appeals* [2014] 2 MLJ 652 and *Ong Hooi Beng & Ors v Public Prosecutor* [2015] 3 MLJ 812. In these cases, the court held that there was sufficient evidence to show that the accused persons were participants in the process of manufacturing dangerous drugs. Similarly, in the present appeals, the appellants were arrested while they were engaging in the act of manufacturing, as such, the present appeals fell under the exception as decided in *Chan Wei Loon's case*. In these regards, the court agreed with the prosecution that *Chan Wei Loon's case* was distinguishable and therefore had no application in the present case (see paras 39–40, 42 & 45). D E F
- (4) Regarding common intention, the court accepted that it was virtually impossible to directly prove a pre-arranged plan between the appellants. Common intention was a question of fact. The proof of common intention was a matter of inference from the circumstances. It was derived from the conduct of the appellants. This inference of their involvement in the manufacturing of methamphetamine in the said factory could be gathered when the appellants were seen together before the premises were raided. They were not there by accident or coincidence. The appellants were arrested at the premise. There was more than credible evidence for the court to make an inference that the appellants acted in concert or were participants in the manufacturing setting of methamphetamine in the said factory. All these acts when combined together proved the nexus between the appellants and the dangerous drugs exhibits seized. With the noticeable odour of chemicals and the G H I

- A running of the fans firmly established not only knowledge but also a common intention of the three appellants to manufacture the drugs (see para 46).
- B (5) The appellants complained that no DNA, fingerprint evidence or traces of drugs were found on the appellants. It was argued that these essential facts were confirmed by the prosecution which showed the absence of link between the appellants and the impugned drugs. However, the court found that this argument was entirely fallacious. It ought to be noted that DNA, fingerprint lifting or even traces of drugs were only corroborative in nature when all other overwhelming evidence of manufacturing were proven. In the present case, there was ample evidence connecting the three appellants with the commission of the offence rendering the forensic evidence to be of little relevant (see para 49).
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- D (6) The court found it difficult to accept the criticisms levelled towards the learned trial judge's evaluation of the defence evidence. A scrutiny of the said judgment revealed that he had judicially considered the defence advanced by the appellants and weighed all their evidence before coming to a definite finding of fact. The learned trial judge had not run afoul of the principles of law as laid down by the Supreme Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169. Further, the court was very mindful of the court's limitation sitting on an appellate capacity reading the record and without the benefit of oral testimony (see paras 53–54).
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- F (7) Having deliberated on the entire defence evidence, the court was of the view that the appellants had failed to raise a reasonable doubt in the prosecution's case, their versions were unbelievable and inconsistent with their innocence. This was especially so where the findings of facts rested upon the substratum of oral evidence, the credibility of which was entirely for the learned trial judge to decide. For the reasons discussed, the court found no real substance in these appeals to merit appellate interference. The evidence against the appellants was so clearly overwhelming. The conviction against the appellants was therefore safe (see para 58).
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- H (8) On sentence, with the Abolition of Mandatory Death Penalty Act 2023 (Act 846) which came into effect on 4 July 2023, the court may consider the mitigating and aggravating factors in the exercise of its discretion in determining the appropriate sentence with either death by hanging or life imprisonment with whipping of not less than 12 strokes. Having considered the facts of the case, the element of public interest, the enormous quantity of the drugs manufactured, the mitigation by learned counsel on behalf of the appellants and the call by the learned deputy public prosecutor to impose the death penalty, the court found that the aggravating factors outweighed the mitigating factors. Hence, the
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sentence meted out by the learned trial judge was affirmed as the sentence was commensurate with the offence committed (see para 59).

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[Bahasa Malaysia summary]

Pada mulanya terdapat empat tertuduh di mahkamah di bawah yang didakwa di bawah s 39B(1)(c) Akta Dadah Berbahaya 1952 ('ADB') dibaca bersama s 34 Kanun Keseksaan atas kesalahan melakukan perbuatan persediaan untuk atau untuk tujuan mengedar dadah berbahaya. Kes pendakwaan adalah berdasarkan keterangan anggota polis yang menyerbu sebuah premis di daerah Seberang Perai Tengah, Pulau Pinang yang digunakan tertuduh-tertuduh untuk membuat dadah berbahaya methamphetamine. Berhubung dengan ini, tertuduh pertama, kedua dan ketiga ditahan ketika mereka terlibat dalam perbuatan pembuatan dadah tersebut. Pada akhir kes pendakwaan, hakim perbicaraan yang arif mendapati bahawa kes prima facie pengedaran melalui pembuatan telah dibuktikan terhadap semua tertuduh dan meminda pertuduhan tersebut kepada pertuduhan bagi kesalahan di bawah s 39B(1)(a) ADB. Keempat-empat tertuduh dipanggil membela diri atas pertuduhan pindaan tersebut. Pembelaan setiap empat orang tertuduh adalah seperti berikut: (a) tertuduh pertama cuba mengalihkan kesalahan kepada seorang Hariran yang telah menyewa tingkat satu premis tersebut daripada tertuduh pertama dan tertuduh pertama menegaskan bahawa dia adalah seorang ahli perniagaan yang sah yang menjual sarung tangan manakala tertuduh kedua dan ketiga adalah pelanggannya; (b) tertuduh kedua dan ketiga berhujah bahawa mereka datang ke Malaysia untuk membeli sarung tangan daripada tertuduh pertama; dan (c) tertuduh keempat memberi keterangan bahawa dia telah diupah oleh tertuduh pertama untuk membersihkan tingkat bawah premis tersebut dan dia tidak pernah naik ke tingkat satu. Pada akhir kes, hakim perbicaraan yang arif melepaskan dan membebaskan tertuduh keempat kerana berjaya menimbulkan keraguan munasabah dalam kes pendakwaan manakala tertuduh pertama, kedua dan ketiga ('perayu-perayu') telah disabitkan dan dijatuhkan hukuman mati, justeru, rayuan semasa. Alasan-alasan rayuan yang dibangkitkan adalah bahawa hakim bicara yang arif telah terkhilaf dalam undang-undang dan fakta: (i) dalam meminda pertuduhan yang dikemukakan terhadap perayu-perayu daripada satu pertuduhan di bawah s 39B(1)(c) ADB kepada pertuduhan di bawah s 39B(1)(a) Akta yang sama pada akhir kes pendakwaan; (ii) dalam mendapati perayu-perayu bersalah atas kesalahan mengedar dadah melalui pembuatan di bawah s 39B(1)(a) ADB tanpa terlebih dahulu membuat dapatan pemilikan yang afirmatif; (iii) dengan tergesa-gesa menolak pembelaan perayu-perayu tanpa memberikan penilaian maksimum dan penghargaan kehakiman yang mencukupi kepadanya; (iv) apabila mendapati terdapat niat bersama antara perayu-perayu untuk melakukan kesalahan pengedaran dadah di bawah s 39B(1)(a) ADB; dan (v) apabila Yang Arif mensabitkan perayu-perayu berdasarkan keterangan yang tidak boleh diterima, iaitu, ekshibit-ekshibit yang tidak dikenal pasti atau ditanda di hadapan Yang Arif — dalam hal ini,

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- A perayu-perayu berhujah bahawa ekshibit-ekshibit tersebut dikenal pasti dan ditandakan di hadapan penolong kanan pendaftar yang bijaksana dalam ketiadaan hakim perbicaraan yang arif adalah prosedur yang tidak diperuntukkan di bawah s 172B Kanun Tatacara Jenayah ('KTJ'), oleh itu, ekshibit-ekshibit tersebut dikatakan tidak boleh diterima kerana pelanggaran jelas s 172B(2)(vi) KTJ.
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Diputuskan, menolak rayuan-rayuan:

- (1) Berdasarkan nota prosiding, hakim perbicaraan yang arif telah menyatakan dengan jelas bahawa beliau akan hadir untuk pengurusan kes pada 18 Februari 2019 dan 19 Februari 2019, tetapi nota prosiding tidak menunjukkan apa yang berlaku semasa pengurusan kes. Oleh itu, adalah tidak tepat untuk mahkamah menganggap bahawa hakim bicara yang arif tidak hadir pada dua tarikh ini seperti yang dikemukakan oleh peguam terpelajar. Walau apa pun, daripada pemeriksaan mahkamah terhadap semua ekshibit yang dikemukakan di mahkamah, mahkamah mendapati ia adalah sama persis dengan ekshibit yang dirampas dari premis tersebut. Mahkamah berpendapat identiti dadah dan rangkaian keterangan yang tidak terputus tidak pernah diragui. Ahli kimia (SP4) juga telah mengenal pasti setiap ekshibit semasa perbicaraan di hadapan hakim bicara yang arif. Secara keseluruhannya, mahkamah mendapati bahawa aduan mengenai ekshibit yang tidak dikenal pasti atau ditanda dengan betul di hadapan hakim perbicaraan yang arif telah terlalu ditekankan, benar-benar tidak boleh diterima, dan hanya pemikiran terkemudian. Tidak ada kelemahan serius yang menyebabkan apa-apa prasangka atau menyebabkan berlakunya kegagalan keadilan kepada semua tertuduh. Oleh itu, aduan peguam terpelajar atas alasan rayuan ini tidak mempunyai merit (lihat perenggan 21–22 & 25).
- (2) Perbuatan pembuatan tidak memerlukan tindakan pemilikan dibuktikan untuk membentuk pengedaran dalam s 2 ADB. Oleh itu, pihak pendakwaan boleh bergantung terutamanya pada keterangan langsung pengedaran untuk membuktikan kes mereka terhadap tertuduh-tertuduh atas pertuduhan yang dipinda kerana tiada anggapan dalam s 37 ADB untuk membantu pembuktian fakta tersebut atau keperluan untuk membuktikan kewujudan pemilikan. Oleh itu, hakim bicara yang arif tidak melakukan apa-apa kekhilafan yang boleh dirayu dalam keputusannya kerana gagal membuat penemuan pasti pemilikan apabila dia mengarahkan tertuduh-tertuduh membela diri atas pertuduhan yang dipinda, justeru, alasan rayuan ini juga tidak mempunyai merit. Setelah menilai keseluruhan keterangan, mahkamah berpuas hati bahawa perayu-perayu telah gagal membebaskan diri mereka daripada penglibatan mereka dalam pengedaran dadah tersebut (lihat perenggan 29, 31 & 37).

- (3) Mahkamah Persekutuan dalam *Chan Wei Loon v Public Prosecutor and another appeal* [2021] 4 MLJ 660 ('kes *Chan Wei Loon*') telah mengakui bahawa pemilikan mungkin relevan dalam beberapa kes pembuatan manakala tidak dalam yang lain. Mahkamah Persekutuan memutuskan bahawa terdapat pengecualian untuk kes pembuatan seperti yang diputuskan dalam *Lee Boon Siah & Ors v Public Prosecutor and other appeals* [2014] 2 MLJ 652 dan *Ong Hooi Beng & Ors v Public Prosecutor* [2015] 3 MLJ 812. Dalam kes-kes ini, mahkamah memutuskan bahawa terdapat keterangan yang mencukupi untuk menunjukkan bahawa orang yang dituduh adalah peserta dalam proses pembuatan dadah berbahaya. Begitu juga, dalam rayuan-rayuan semasa, perayu-perayu telah ditangkap semasa mereka terlibat dalam perbuatan pembuatan, oleh itu, rayuan-rayuan semasa adalah di bawah pengecualian seperti yang diputuskan dalam kes *Chan Wei Loon*. Dalam hal ini, mahkamah bersetuju dengan pihak pendakwaan bahawa kes *Chan Wei Loon* boleh dibezakan dan oleh itu tidak terpakai dalam kes ini (lihat perenggan 39–40, 42 & 45). A B C D
- (4) Berkenaan niat bersama, mahkamah menerima bahawa hampir mustahil untuk membuktikan secara langsung rancangan yang telah diatur antara perayu-perayu. Niat bersama adalah persoalan fakta. Bukti niat bersama adalah soal inferens daripada keadaan. Ia diperoleh daripada kelakuan perayu-perayu. Inferens mengenai penglibatan mereka dalam pembuatan methamphetamine di kilang tersebut boleh didapati apabila perayu-perayu dilihat bersama sebelum premis tersebut diserbu. Mereka tidak berada di sana secara tidak sengaja atau kebetulan. Perayu-perayu telah ditangkap di premis tersebut. Terdapat lebih daripada keterangan yang boleh dipercayai untuk mahkamah membuat inferens bahawa perayu-perayu bertindak secara bersama-sama atau merupakan peserta dalam persekitaran pembuatan methamphetamine di kilang tersebut. Kesemua perbuatan ini apabila digabungkan bersama-sama membuktikan hubungan antara perayu-perayu dan bahan-bahan ekshibit dadah berbahaya yang dirampas. Dengan bau bahan kimia yang ketara dan kipas-kipas yang dibuka bukan sahaja membuktikan pengetahuan tetapi juga niat bersama ketiga-tiga perayu untuk membuat dadah (lihat perenggan 46). E F G H
- (5) Perayu-perayu mengadu bahawa tiada DNA, bukti cap jari atau kesan dadah ditemui pada perayu-perayu. Dihujahkan bahawa fakta penting ini disahkan oleh pihak pendakwaan yang menunjukkan ketiadaan kaitan antara perayu-perayu dan dadah yang disangkal. Bagaimanapun, mahkamah mendapati hujah ini adalah salah sama sekali. Perlu diingatkan bahawa DNA, kesan cap jari atau bahkan kesan dadah hanya bersifat menyokong apabila semua keterangan pembuatan lain yang melimpah ruah telah dibuktikan. Dalam kes ini, terdapat banyak keterangan yang menghubungkan ketiga-tiga perayu dengan pelakuan I

- A kesalahan yang menyebabkan keterangan forensik menjadi kurang relevan (lihat perenggan 49).
- (6) Mahkamah mendapati sukar untuk menerima kritikan yang dilemparkan terhadap penilaian hakim bicara yang bijaksana terhadap keterangan pembelaan. Penelitian terhadap penghakiman tersebut mendedahkan bahawa beliau telah mempertimbangkan secara kehakiman pembelaan yang dikemukakan oleh perayu-perayu dan menimbang semua keterangan mereka sebelum membuat penemuan fakta yang pasti. Hakim perbicaraan yang arif tidak melanggar prinsip undang-undang seperti yang ditetapkan oleh Mahkamah Agung dalam *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169. Tambahan pula, mahkamah amat prihatin terhadap had mahkamah yang bersidang dalam kapasiti rayuan yang membaca rekod dan tanpa faedah keterangan lisan (lihat perenggan 53–54).
- D (7) Setelah membincangkan keseluruhan keterangan pembelaan, mahkamah berpendapat bahawa perayu-perayu telah gagal menimbulkan keraguan munasabah dalam kes pendakwaan, versi mereka adalah sukar dipercayai dan tidak konsisten dengan ketidakbersalahan mereka. Ini terutamanya apabila penemuan fakta terletak pada substratum keterangan lisan, yang kredibilitinya adalah sepenuhnya untuk diputuskan oleh hakim bicara yang bijaksana. Atas alasan-alasan yang dibincangkan, mahkamah mendapati bahawa rayuan-rayuan ini tidak mempunyai merit yang memerlukan campur tangan rayuan. Keterangan-keterangan terhadap perayu-perayu sangat jelas. Oleh itu sabitan terhadap perayu-perayu adalah selamat (lihat perenggan 58).
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- (8) Berkenaan hukuman, melalui Akta Pemansuhan Hukuman Mati Mandatori 2023 (Akta 846) yang berkuat kuasa pada 4 Julai 2023, mahkamah boleh mempertimbangkan faktor peringanan dan pemberatan dalam menjalankan budi bicaranya dalam menentukan hukuman yang sesuai sama ada hukuman gantung sampai mati atau penjara seumur hidup dengan sebatan tidak kurang daripada 12 sebatan.
- H Setelah mempertimbangkan fakta kes, unsur kepentingan awam, kuantiti besar dadah yang dibuat, mitigasi oleh peguam terpelajar bagi pihak perayu-perayu dan gesaan oleh timbalan pendakwa raya terpelajar untuk menjatuhkan hukuman mati, mahkamah mendapati bahawa faktor pemberatan mengatasi faktor peringanan. Oleh itu, hukuman yang dijatuhkan oleh hakim perbicaraan yang arif disahkan kerana hukuman tersebut setimpal dengan kesalahan yang dilakukan (lihat perenggan 59).]
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Cases referred to

(1) *Namasiyiam* (2) *Rajindran* (3) *Goh Chin Peng*, and (4) *Ng Ah Kiat v PP* [1987] 2 MLJ 336; [1987] 1 CLJ 540, SC (refd)

Adiswaran all Tharumaputrintar v PP and other appeals [2014] 3 MLJ 228, FC (refd)

Chan Wei Loon v PP and another appeal [2021] 4 MLJ 660; [2021] 6 CLJ 623, FC (distd)

Dato' Seri Anwar bin Ibrahim v PP and another appeal [2015] 2 MLJ 293, FC (refd)

Keong Gim Chye v PP and another appeal [2018] MLJU 592; [2018] 1 LNS 592, CA (refd)

Lee Boon Siah & Ors v PP and other appeals [2014] 2 MLJ 652, CA (refd)

Lee Boon Siah & Ors v PP (Criminal Appeal No 05–182–08 of 2013) (unreported), FC (refd)

Md Zainudin bin Raujan v PP [2013] 3 MLJ 773, FC (refd)

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 2073, SC (refd)

Ong Hooi Beng & Ors v PP [2015] 3 MLJ 812, CA (refd)

PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 1 CLJ 138; [1983] CLJ Rep 721, FC (refd)

Pendakwa Raya v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560, FC (refd)

Yeo Kwee Huat v PP [2011] 5 CLJ 630, CA (refd)

Legislation referred to

Abolition of Mandatory Death Penalty Act 2023

Criminal Procedure Code s 172B, 172B(2)(vi)

Dangerous Drugs Act 1952 ss 2, 37, 37(d), 37(da), 39B(1), 39B(1)(a), 39B(1)(c)

Penal Code s 34

Appeal from: *Balakrishnan all Jaganathan & Ors v Public Prosecutor* [2020] MLJU 246 (High Court, Pulau Pinang)

Foong Kitson (with Vam Shir Mooi) (Kit & Assoc) for the appellant.

Mohd Khushairy bin Ibrahim (Public Prosecutor, Attorney General's Chambers) for the respondents.

A Azmi Ariffin JCA:

INTRODUCTION

B [1] This is an appeal against the conviction and sentence of the three appellants ie SeyedMohsen Namazivaj SeyedReza ('first appellant'), Balakrishnan a/l Jaganathan ('second appellant') and Mohammad Abbasi Younes ('third appellant') on the amended charge under s 39B(1)(a) of the Dangerous Drugs Act 1952.

C [2] All the three appellants were found guilty and convicted of the offence by the Penang High Court. They were each sentenced to death.

D [3] Being dissatisfied with the said decision, the three appellants appeal to this court.

THE CHARGE

E [4] To begin with, initially there were four accused charged in the High Court at Georgetown, Penang under s 39B(1)(c) of the Dangerous Drugs Act 1952.

[5] They were as follows:

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- (a) Balakrishnan a/l Jaganathan as the first accused;
 - (b) Mohammad Abbasi Younes as the second accused;
 - (c) SeyedMohsen Namazivaj SeyedReza being the third accused; and
 - (d) Lacheme Devi a/p Balasundram being the fourth accused.

G [6] The original charge preferred against all the four accused reads as follows:

H Bahawa kamu bersama-sama pada 20/8/2015 jam lebih kurang 2210 hrs di premis No. 57B, Perindustrian Kecil Taman Sri Rambai, dalam Daerah Seberang Perai Tengah, di dalam Negeri Pulau Pinang telah melakukan suatu perbuatan bagi persediaan bagi tujuan mengedar dadah berbahaya jenis Methamphetamine seberat 48,623 gram. Oleh itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(c) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B (2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

I [7] At the end of the prosecution case, the learned High Court judge found that a prima facie case of trafficking by way of manufacturing was established against all the accused and amended the charge to one of an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The four accused were called

upon to enter their defence on the amended charge. They elected to give evidence under oath. A

[8] At the end of the defence case, the learned trial judge acquitted and discharged the fourth accused for having successfully raised a reasonable doubt in the prosecution case. Whilst the present three appellants/accused were convicted and sentenced to suffer death. Against the said order, the three appellants appeal. B

[9] We will for convenience in this appeal, refer the three appellants in the manner they were referred to in the High Court. C

THE PROSECUTION'S CASE

[10] The case of the prosecution was well laid out by the learned trial judge in his grounds of judgment which is reproduced herein: D

1. The prosecution's evidence shows that the police had targeted a premise for surveillance at the address of 57B, Perindustrian Kecil Taman Sri Rambai, dalam Daerah Seberang Perai Tengah, Penang ('the premise'). E
2. The surveillance was carried out by two separate teams of police officers at different times. The first team was led by ASP Mohd Suhaimi (SP7). SP7 testified that on 19 August 2015 at about 9am he had received a tip off of drug processing taking place at the premise.
3. SP7 arrived outside the premise at 5PM on 19 August 2015 and started the surveillance from a distance of 50 to 70 meters where he could see the entrance of the premise. SP7 divided his team into a number of groups each with their respective instructions. At 5PM SP7 saw a lorry with a red head arrive at the premise. He saw an Indian man later identified in court as the first accused alighting from the lorry. The first accused carried out a few boxes from the lorry and brought them into the premise. The first accused then left the premise. F G
4. At about 6.41pm the same day SP7 saw the first accused return to the premise in a black MyVi car bearing the registration number WVT 3454. This time the second third and fourth accused who were with the first accused alighted from the car and entered into the premise. H
5. At about 9.30pm SP7 saw the first and fourth accused leaving the premise and return at 10.30pm bringing back food packets and they again entered the premise. None of the four accused came out of the premise that night.
6. The next morning at 6.45 am SP7 saw the first and fourth accused come out of the premise with the first accused carrying two black plastic bags whereas the fourth accused carried one plastic bag. All the plastic bags were put into the MyVi and both the first and fourth accused left the premise. I

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| A | 7. | SP7 decided to follow the MyVi leaving another team to continue surveillance of the premise. SP7 tailed the MyVi car to a distance of 4 to 5 km until the car stopped at a rubbish dump container. SP7 saw the fourth accused take out the three plastic bags and throw into the waste dump container. |
| B | 8. | SP7 retrieved the three plastic bags and opening the plastic bags found in one plastic bag which he marked as A, five plastic trays labelled as Phosphorous Red, in the second plastic which SP7 marked as B, SP7 saw 33 transparent plastic wrappers yellowish in colour and from the third plastic bag which SP7 marked as C, SP7 found a plastic hose, one mineral bottle and 48 bundle of plastic wrappers. |
| C | 9. | After retrieving the plastic bags SP7 returned to the premise and sought the assistance of Inspector Mohamad Zaidi (SP1) to continue the surveillance of the premise. SP1 and his team were the second team who continued with the surveillance after taking over from SP7 at about 8pm. |
| D | 10. | Meanwhile SP7 went to the police station and lodged a police report as well as handed the items seized to the Investigating Officer (SP3). |
| E | 11. | At 10pm while SP1 was on duty of look out nearby the premise he saw a Volvo car bearing registration plate PGK 265 stop in front of the premise. The first accused alighted from the car and entered into the premise. SP1 then directed his men to standby to carry out a raid on the premise. |
| F | 12. | At 10.10pm the first accused came out of the premise prompting SP1 to spring into action and approach the first accused. SP1 identified himself as a police officer and detained the first accused. SP1 then entered the premise and went to the first floor and upon entering smelled a smell of acid emanating from the first floor as well as heard loud sound of fan rotating. SP1 also saw three metal containers boiling some chemicals on three stoves. SP1 also saw two large exhaust fans. |
| G | 13. | Upon further search SP1 saw the second and third accused in a room on the first floor. All three accused were searched and SP1 recovered the identity card of the first accused as well as assortment of keys. SP1 saw a lot of items on the first floor and listed down all the items in the search list which was tendered in court as P10. |
| H | 14. | SP1 continued the search on the ground floor and found many boxes containing chemical labelled as hydraulic acid, toluene, red phosphorous and others. SP1 and his men then searched the houses using the keys found on the first accused. In one house Inspector Mohammed Amirullah (SP10) found the fourth accused and detained her. |
| I | 15. | All the items seized by SP1 and all the four accused were handed to SP3 on 21 August 2015 at 4am. SP3 on receiving information about the raid had already arrived at the premise at about 1.30am and had brought along the police photographers who took all the photographs on the direction of SP3 after SP1 gave details of the raid to SP3. SP3 confirmed the smell of |

chemical emanating at the first floor. SP3 also drew a sketch plan of both the ground floor as well as the first floor detailing out the finding of the various items in the premise.

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16. On reaching the police station and after being handed over all the seized items SP3 contacted the chemistry department to get the assistance of the chemist to visit the premise. At 11am the chemist from the Chemistry Department Penang Puan Afizawati (SP4) arrived at the premise and took samples of all liquids at the premise as well as took swabs. Her finding on analysis of all samples given to her as well as items seized were reduced into her report which was tendered in court and marked as P23. SP4 on analyzing all the items as well as seeing the premise concluded that the premise was used to process the dangerous drugs methamphetamine.

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17. The police forensics team also visited the premise and took samples and swabs from the premise as well as the cars used by the first accused and prepared a forensics report which was tendered in Court.

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FINDINGS OF THE LEARNED TRIAL JUDGE AT THE END OF THE PROSECUTION'S CASE

[11] In the instant appeal, the learned trial judge, citing various authorities, centred his findings on the four accused's involvement in manufacture of the dangerous drug, break in chain of evidence pertaining to the seized drugs, doubt in respect of the identity of the drug produced in court and failure to consider the element of possession, etc. The learned trial judge addressed to the aforesaid issues in the following's words:

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18. The burden upon the prosecution at the end of the prosecution's case is to prove a prima facie case.

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19. The judgment in *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89 the Court of Appeal held:

[26] It therefore follows that there is only one exercise that a judge sitting alone under s180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal.

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20. One of the challenges faced by the police in this case was to seize and mark every item found on the premise which amounted to hundreds of items. Some of the items were too bulky and hazardous to be brought to the court and had to be kept in special rooms at the police storage facility. To overcome this obstacle of tendering of this item as exhibits the court decided to have a proceeding of the court at the police storage facility, to mark, label and see the items seized. This was done in the presence of all the four accused and their defence counsel. The whole exercise took nearly four hours. In the court's observation all the items were well kept with the

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- A markings of the seizing officer as well as the markings of the investigating officer and the chemist all intact. In short there is no break in the chain of evidence of the items seized and which were later sent to the chemist and finally produced before the court.
- B 21. In the case of *Gunalan all Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489, the Court of Appeal decided:
- C [41] First, by way of a general observation, I am of the view that, in a drug trafficking case what is important is that it must be proved that it is the substance that was recovered that was sent to the chemist for analysis and it is that same substance that is found to be heroin or cannabis etc and it is in respect of that substance that an accused is charged with trafficking. So, the chain of evidence is more important for the period from the time of recovery until the completion of the analysis by the chemist. Even then it does not necessarily mean that if the exhibit is passed from one person to another, every one of them must be called to give evidence of the handing over from one person to another and if there is a break, even for one day, the case falls. There should be no confusion between what has to be proved and the method of proving it. What has to be proved is that it is the substance that was recovered that was analysed by the chemist and found to be heroin, cannabis etc, and it is for the trafficking of that same substance that the accused is charged with.
- D
- E [42] The proof of the chain of evidence is only a method of proving that fact. The fact that there is a gap does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But, if for example, during that 'gap' the exhibits are sealed, numbered with identification numbers, there is no evidence of tempering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the circumstances of the case, may not give rise to any doubt of that fact.
- F
- G 22. The court also accepted the evidence of the chemist especially on her observation visiting the premise that it was used as a place to process the dangerous drug methamphetamine. The evidence of the chemist was not shaken during cross-examination and the court had no reason to disregard her testimony.
- H 23. In this case the court concluded that there was direct evidence of trafficking without resorting to any presumption. The raid drew a clear picture of the complicity of all the four accused in processing the drugs. The complicity of the first accused was further established by the fact that the premise belonged to a Company in which he was a Director. Being in the premise overnight with the noticeable odour of chemicals and the running of the fans firmly establishes not only knowledge but also a common intention to manufacture the drugs.
- I 24. The court this case also determined that another suspect in this case by the name of Hariharan who was a purported tenant of the first floor of the premise and not called as a witness did not raise any adverse inference against the case for the prosecution. This person even if he was a tenant was not a material witness and his non-calling did not leave any gap in the case for the prosecution. The prosecution

had tendered sufficient evidence to prove on prima facie base the complicity of the 4 accused in the manufacture of the drugs.

25. The Federal Court in *Amri bin Ibrahim & Anor v Public Prosecutor and another appeal* [2017] 1 MLJ 1; [2017] 1 CLJ 617 ruled:

[56] The issue of the non-calling of Phee Chin Guan was argued before the Court of Appeal by the defence. The Court of Appeal held inter alia that Phee Chin Guan was not an essential or material witness to the prosecution in order to establish a prima facie case at the close of its case or to prove its case beyond reasonable doubt at the end of the defence case and the non-calling of Phee Chin Guan did not leave a gap in the prosecution's case. It was also held that on the facts of the case, the learned trial judge did not err in not invoking s 114(g) of the Evidence Act 1950 against the prosecution.

[57] The power of the court to draw an adverse inference under s 114(g) of the Evidence Act 1950 is discretionary. It depends on the circumstances of the case and particularly in cases where the material witnesses are not produced (see *Lau Song Seng v Public Prosecutor* [1998] 1 SLR 663). The scope of s 114(g) has been explained by the Supreme Court in *Munusamy Vengadasalam v Public Prosecutor* [1987] 1 MLJ 492 at p 494; [1987] 1 CLJ 250; [1987] CLJ Rep 221 at p 223:

... It is essential to appreciate the scope of section 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[58] On the facts of the case we agree with the finding of the Court of Appeal that adverse inference under s 114(g) of the Evidence Act ought not to be drawn against the prosecution for not calling Phee Chin Guan as its witness. We agree with the reasons given by the Court of Appeal.

26. Taking into consideration the entire evidence of the prosecution the court was satisfied that the prosecution had led sufficient evidence to prove that all the 4 accused were involved in the manufacture of the dangerous drug methamphetamine and were not merely preparing to manufacture the drugs. The finding of 48,623g of methamphetamine together with chemicals being boiled showed that further manufacture of the drugs was taking place. The court therefore taught it fit to amend the charge as the court is authorized to do so.

27. The amended charge by the court reads:

Bahawa kamu bersama-sama pada 20/8/2015 jam lebih kurang 10.10 malam di No. 57B, Perindustrian Kecil Taman Sri Rambai, dalam daerah Seberang Perai Tengah, di dalam negeri Pulau Pinang, telah mengedar dengan cara pembuatan (manufacturing) dadah berbahaya jenis Methamphetamine. Oleh itu, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952 dan dibaca bersama seksyen 34 Kanun Keseksaan.

- A 28. The offence of manufacturing dangerous drugs however would not need for the element of possession to be first proved. The Court of Appeal in *Lee Boon Siah & Ors v Public Prosecutor and other appeals* [2014] 2 MLJ 652; [2014] 3 CLJ 584 ruled:
- B [32] For the proper determination of this issue, It must be borne-in mind that, as stated in s 2 of the DDA, the term 'manufacture' includes numerous and diverse processes or procedures namely making, producing, compounding, assembling, refining or transformation of the offending drugs. For that reason, in our judgment, unlike for example the act of keeping, concealing, storing, transporting and carrying dangerous drugs which constitute 'trafficking' as defined in s 2 of the DDA that involve the requirement of possession, the manufacturing of dangerous drugs as in the present case does not involve possession (see: *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 and *Public Prosecutor v Mansur Md Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233). In other words, possession of the impugned drugs need not be proven in a case involving 'manufacturing' before the trafficking definition in s 2 of the DDA can be invoked.
- D 29. Upon amending the charge, the charge was read and explained to the accused and all of them still claimed trial. The defense counsel also did not avail the opportunity given by the court to recall any witnesses. The court therefore directed all the four accused to defend themselves on the amended charge.

E THE CASE FOR THE DEFENCE

- [12] The four accused defence had also been summarised by the learned trial judge, and we now reproduce:
- F 30. In his defense the first accused sought to shift the blame to a person whom he had rented out the first floor of the premise by the name of Hariharan. According to the first accused he was a legitimate businessman and this was supported by the fact that there were numerous sacks of gloves which he traded in kept on the ground floor. Both the second and third accused were his customers and had ordered a huge quantity of gloves which needed to be sorted out and packed. This was done with the assistance of the fourth accused. The second and third accused had used the room upstairs to await the preparation of the documentation and consignment. According to the first accused the second and third accused were not in the premise overnight but had gone back to the place they were staying via the back door.
- G
- H 31. The second and third accused echoed the entire evidence of the first accused and further added particulars of their business in their home country. According to them they had come to Malaysia with the sole intent of buying a huge consignment of the gloves. They had got the first accused contact number online and had then come to Penang from Kuala Lumpur.
- I 32. The fourth accused testified that she was employed by the first accused to do cleaning of the ground floor and had never gone up to the first floor. She further testified that she only assisted the first accused when he called for her. She only came to the premise on an irregular basis once a week. On the day of the police raid she admitted that she was at the premise to sort out the gloves ordered by the second and third accused.

FINDINGS OF THE LEARNED TRIAL JUDGE AT THE CONCLUSION OF THE TRIAL A

[13] The learned trial judge then analysed the evidence of the all the four accused and concluded:

36. The evidence of the all the 4 accused is hardly believable and in fact borders upon absurdity. The attempt to shift the blame to his tenant by the first accused was pathetic. The first accused could not even produce any tenancy agreement although according to him he was receiving a rental of RM3,000 a month. Even more obvious is the fact that although he had rented the premise the first accused did not seem to have surrendered the possession of the first floor as he was free to use the first floor which he did in this case by allowing in his own words the second and third accused to wait in the room above. B

37. Further the strong odour of the chemicals could have alerted anyone that something was literally cooking on the first floor and should be investigated. The first accused ignored all the alarm bells and in fact even allowed his tenant to keep large consignment of chemicals on the ground floor. The first accused is clearly lying and the court made a firm finding that both the ground floor and the first floor belonged to the first accused and was used by him for his illicit trade. The sacks of gloves were just a front to camouflage the manufacture of the drugs. C

38. The photographs taken by the police speaks a thousand words and show a large number of paraphernalia being used in the production of the drugs. Even a blind man could see the drugs being cooked yet the second and third accused sitting in the room outside of which the chemicals were boiling in the containers feigned ignorance of any knowledge. D

39. The evidence of the second and third accused that they were in the premise for a short period of time and had gone back to their apartment is a clear lie. The evidence of the police which the court had no reason to disbelieve was that there were a number of teams holding a surveillance of the entire surroundings of the premise yet they did not see anyone leaving even from the back door. Further the photograph shows although there is a back exit it inaccessible due to large number of boxes blocking the way to the exit. The court gain made a firm finding of fact that all the four accused were in the premise throughout the night and until the time the police raided the premise. E

40. The evidence of the second and third accused that their sole purpose of coming to Malaysia was to source for gloves is hardly convincing for a number of reasons. The third accused showed a photograph of his shop in his home country and it is apparent that the shop is too small to store the number of gloves which both the second and third accused claim that they were purchasing. Further in their testimony although they claimed their main intention of coming to Malaysia was to source for gloves yet they spent a large number of days sightseeing. Even more puzzling is although they claim to be such big and busy businessman they have not purchased a return ticket back to their country. In short, the evidence of the first, second and third accused is fictitious, imaginary and does not even raise an iota of doubt in the face of the overwhelming evidence led by the prosecution. F

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- A** 42. As to the evidence of the fourth accused her testimony that she was working only part time for the first accused was not challenged by the prosecution. From the fact it is clear that she was aware of what was happening at the premise. In short, she knew something was being cooked but there is a reasonable doubt in the court's mind of whether the fourth accused knew what actually cooking was illicit drugs.
- B** The fourth accused did not come across as being very intelligent and might not have fathomed that the first accused was involved in illicit trade. Therefore, the court is of the view that it is more probable that the fourth accused did not have knowledge about the manufacturing of the dangerous drugs in the premise.
- C** 44. Therefore, this court finds the first, second and third accused guilty on the amended charge and sentences them to death by hanging per the amended charge. There is also no evidence put forward that the three the accused falls under any of the provisions pursuant to s 39B(2A) of the Dangerous Drugs Act 1952 to be spared from a death sentence. As for the fourth accused, the court is of the opinion that there is reasonable doubt and hereby the fourth accused is acquitted and discharged.

D THE APPEAL

E [14] Before us, although the petition of appeal contained several grounds, learned counsels for the first, second and third accused submitted that they will be confined to only the following grounds of appeal. The combined grounds relied on by them were:

- F** (a) The learned trial judge erred in law and fact in amending the charge proffered against the appellants from one under s 39B(1)(c) of the Dangerous Drugs Act 1952 to one under s 39B(1)(a) *of the same Act at the end of the prosecution's case.*
- G** (b) The learned trial judge erred in law and fact in finding the appellants guilty of an offence of drug trafficking by way of manufacturing under s 39B(1)(a) of the Dangerous Drugs Act 1952 without first making an affirmative finding of possession.
- H** (c) The learned trial judge erred in hastily dismissing the appellants' defence without having accorded maximum evaluation and adequate judicial appreciation to it.
- I** (d) The learned trial judge erred in law and fact in finding there was a common intention between the appellants to commit an offence of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952.
- (e) The learned trial judge erred in law and/or fact when His Lordship convicted the appellants based upon inadmissible evidence ie., exhibits which were not identified nor marked in His Lordship's presence.

The relevant provision of laws:

- (a) s 2 of the Dangerous Drugs Act 1952 defines 'trafficking' as follows:
In this Act, unless the context otherwise requires —

‘trafficking’ includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act;

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- (b) s 2 of the of the Dangerous Drugs Act 1952 defines ‘manufacture’ as follows:

‘manufacture’: in relation to a dangerous drug, includes —

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- (c) the making, producing, compounding and assembling of the drug;
- (d) the making, producing, compounding and assembling a preparation of the drug;
- (e) the refining or transformation of the drug into another dangerous drug; and
- (f) any process done in the course of the foregoing activities.

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- (a) s 39B(1) of the Dangerous Drugs Act 1952 reads as follows:

39B Trafficking in dangerous drugs

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(1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia —

- (b) traffic in a dangerous drug;
- (c) offer to traffic in a dangerous drug; or
- (d) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.

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- (a) s 34 of the Penal Code provides as follows:

When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

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OUR DECISION

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[15] Having considered the submissions of both learned counsels and learned deputy public prosecutor and having perused the appeal records, we unanimously decide as follows:

[16] The essence of the accused defence was that the exhibits identified and marked before the learned senior assistant registrar in the absence of the learned trial judge is a procedure not provided under s 172B of the Criminal Procedure Code. Thus, the exhibits tendered are said to be inadmissible due to its clear contravention of s 172B(2)(vi) of the Criminal Procedure Code.

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A [17] For ease of reference, s 172B of the Criminal Procedure Code is reproduced below:

172B Case Management

B (1) A Magistrate, Sessions Court Judge or Judge of the High Court, as the case may be, shall commence a case management process within sixty days from the date of the Accused being charged and claims to be tried.

(2) At the case management, the Magistrate, Sessions Court Judge or Judge shall —

C (i) take into consideration all matters that have been considered and agreed to by the Accused and his advocate and the prosecution during the pre-trial conference; and where a plea bargaining has been agreed between the accused and his advocate and the prosecution during the pre-trial conference, the Magistrate or the Sessions Court Judge or the Judge trying the case shall decide on the voluntariness of the accused in the plea bargaining according to the provisions of section 172C;

D (ii) where no pre-trial conference has been held on the ground that the accused is unrepresented, discuss with the accused and the prosecution any matter which would have been considered under section 172A;

E (iii) assist an accused who is unrepresented to appoint an advocate to represent the accused; determine the duration of the trial;

(iv) subject to subsection (3), fix a date for the commencement of the trial;

(v) subject to the consent of the accused and his advocate, and the prosecution, admit any exhibits; and

F (vi) give directions on any other matter as will promote a fair and expeditious trial.

(3) A subsequent case management, if necessary, may be held not less than two weeks before the commencement of the trial.

G (4) The trial shall commence not later than ninety days from the date of the accused being charged.

(5) Notwithstanding subsections (1) and (4), a failure for the case management or the trial to commence according to the time period specified in the subsections shall not —

H (a) render the charge or prosecution against the accused as defective or invalid; or

(b) be considered as a ground for appeal, review or revision.

I (6) Notwithstanding the provisions of the Evidence Act 1950, all matters that have been reduced into writing and duly signed by the accused, his advocate and the prosecution under subsection 172A(5) shall be admissible in evidence at the trial of the accused.

[18] To answer those questions, it plainly requires us to closely examined the notes of proceedings in its entirety.

[19] On 23 January 2019, the learned trial judge had exercised his power under s 172B(2)(vi) of the Criminal Procedure Code to allow the prosecution's application to have certain exhibits identified and marked at the storeroom located at Seberang Perai Utara, Kepala Batas, in view of the voluminous exhibits seized from the arrest.

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Mahkamah: Ya ok. Untuk tujuan PTC pagi ini, saya ingat bolehkah pihak-pihak bersetuju tentang saksi dan juga dokumen. Barang kes fizikal terlalu banyak.

B

TPR: Ya Yang Arif.

Mahkamah: Tak apa you buat yang ini dulu. Saya akan putuskan sama ada dan adalah permohonan DPP untuk pergi ke mana, balai ka?

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TPR: Pergi ke Stor Terkumpul di SPU (Seberang Perai Utara) di Kepala Batas.

Mahkamah: Untuk melihat itu, tak boleh bawa sini, terlalu banyak?

TPR: Satu terlalu banyak. The other one is hazardous Yang Arif sebab dia disimpan di bilik khas dekat bahan-bahan kimia.

D

Mahkamah: Ok untuk sementara ini seperti yang saya kata, saya akan putuskan first case ditetapkan bulan depan.

TPR: Ya Yang Arif.

Mahkamah: Boleh buat arrangement ka since jurubahasa ada dengan tertuduh mungkin boleh pergi tengahari ini.

E

TPR: Tengahari ini Yang Arif.?

Mahkamah: Ya. Boleh buat persediaan untuk pergi tengahari ini because tak ada masa lain kerana bulan depan bicara. You buat persediaan pergi kalau tengahari boleh, saya nak pergi tengahari ini.

F

TPR: Saya akan cuba tanya kepada IO.

Mahkamah: Yang lain buat sekarang, yang ptc lain buat sekarang.

TPR: Boleh Yang Arif. Mohon tangguh sebentar.

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(See notes of proceedings dated 23 January 2019, pp 3–4, Vol 2A Records of Appeal, encl 17.)

[20] Having allowed the said application, the learned trial judge had further directed the following:

H

- (a) A case management be fixed on 18/2/2019 and 19/2/2019 to facilitate the identification and marking of the exhibits at the storeroom.
- (b) List of Exhibits be prepared during the identification and marking of the exhibits at the storeroom at Seberang Perai Utara, Kepala Batas.

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TPR: Untuk makluman Yang Arif, barang-barang kes ini masih belum disusun.

Mahkamah: Kalau macam itu, you sediakan list ekshibit fizikal dan sediakan ekshibit itu untuk mahkamah melawat tempat itu atau pergi ke tempat itu so apa tarikh yang dicadangkan because saya nak dibuat sebelum tarikh bicara.

- A** TPR: 18, 19 of Februari Yang Arif. Saya cadangkan untuk dua tarikh jika dapat siapkan satu hari because that date dates had been fixed before.
- Mahkamah: 18 saya ada kes kan. So okay ini saya akan tetapkan 18hb Februari yang sesuai untuk semua pihak tapi saya akan tetapkan pada 2.30 petang so you buat arrangement 2.30 petang kita akan pergi ke tempat itu. Semua pihak termasuk tertuduh. So TP kena issue untuk mereka pergi ke tempat itu satu hari dah cukup untuk tengok saja kan.
- B**
- TPR: Saya takut peguam nak tengok marking tandaan-tandaan pada barang kes ini. Yang Arif setakat ini tandaan barang kes dadah saja yang boleh bawa ke mahkamah, barang-barang kes lain tak boleh Yang Arif.
- C**
- Mahkamah: 18 saya akan hadir sendiri ke tempat itu, tapi 19 tak perlu saya akan hantar SAR tapi kalau 19 masa pagi kalau SAR boleh pergi dia akan pergi daripada pagi lah. Untuk 19 saya tetapkan 10 pagi.
- TPR: 19, 10 pagi dan 18, 2.30 petang.
- D**
- Mahkamah: Ya
- TPR: Baik Yang Arif.
- (See notes of proceedings dated 23 January 2019, p 7, Vol 2A Records of Appeal, encl 17.)
- E**
- [21] From the notes of proceedings, the learned trial judge had clearly stated that he will be present for the case management to have the exhibits identified, marked and admitted as exhibits at the storeroom located at Seberang Perai, Kepala Batas. Unfortunately, the record in the notes of proceedings does not
- F**
- shows what transpired on the 18 February 2019 and 19 February 2019 at the said location. Hence, we are not in the position to exactly say what had actually transpired during the case management on these two scheduled dates.
- G**
- [22] Thus, it will not be correct for us to made assumption that the learned trial judge was not present on these two dates as submitted by learned counsels. Be that as it may, from our examination of all the exhibits tendered in court, we find that it was exactly the same exhibit that was seized from the premises. To our mind the identity of the drugs and the unbroken chain of evidence is never
- H**
- in doubt. The chemist, SP4 had also identified each and every exhibit during the course of the trial before the learned trial judge.
- [23] To support our view in this regard, perhaps reference can also be made to the notes of proceedings at p 15 Vol 2A Records of Appeal, encl 17, where
- I**
- SP4 in evidence-in-chief said:
- TPR: Yang Arif, semua barang-barang ekshibit ini telah ditandakan semasa di Stor Barang Kes sebelum ini.
- Mahkamah: Ya, saya ingat semua peguambela bersetuju dengan pengecaman barang ini adalah mencukupi.

Peguambela OKT-OKT: Ya

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[24] Their concession in this case undoubtedly speak volume. Now, before us, learned counsels for the accused had also fairly, and quite properly conceded that the tendering and marking of all the items seized at the police storage facility was done in their presence and witness by all the four accused persons.

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[25] Having view the whole of the notes of proceeding and the evidence objectively and from all angles, we can safely say that the present complaint raised about the exhibits which were not properly identified nor marked in the learned trial judge's presence have been over emphasised, truly unacceptable and merely an afterthought. Neither there were serious infirmities that had caused any prejudiced or occasioned miscarriage of justice to all the accused. Hence, learned counsels' complaint on this ground of appeal is bereft of any merit.

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[26] Learned counsels next attacked the finding of the learned trial judge when he found the accused guilty offence of drug trafficking by way of manufacturing under s 39B(1)(a) of the Dangerous Drugs Act 1952 without first making an affirmative finding of possession and the learned trial judge failure to do so amounted to a misdirection warranting appellate intervention.

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[27] To fortify this finding, we can do no better than referring to the learned trial judge's discussion on this issue. In short, this is what he says:

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[28] The offence of manufacturing dangerous drugs however would not need for the element of possession to be first proved. The Court of Appeal in *Lee Boon Siah & Ors v Public Prosecutor* [2014] 2 MLJ 652; [2014] 3 CLJ 584 ruled:

[32] For the proper determination of this issue, It must be borne in mind that, as stated in s 2 of the DDA, the term 'manufacture' includes numerous and diverse processes or procedures namely making, producing, compounding, assembling, refining or transformation of the offending drugs. For that reason, in our judgment, unlike for example the act of keeping, concealing, storing, transporting and carrying dangerous drugs which constitute 'trafficking' as defined in s 2 of the DDA that involve the requirement of possession, the manufacturing of dangerous drugs as in the present case does not involve possession (see: *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 and *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233). In other words, possession of the impugned drugs need not be proven in a case involving 'manufacturing' before the trafficking definition in s 2 of the DDA can be invoked.

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[28] To this, perhaps we should add that the case for the prosecution was not based on custody or control thereby invoking the notion of mens rea possession of the said drugs or attracting the presumption of possession and knowledge

A under s 37(d) of the Dangerous Drugs Act 1952 or invoking the presumption of trafficking under s 37(da) of the same Act. We are mindful that before any act of trafficking within the definition of trafficking under s 2 of the Dangerous Drugs Act 1952 could be invoked, possession of the drug in question has to be proved. Augustine Paul J (as he then was) in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705, said:

B It must be observed that most of the acts that constitute ‘trafficking’ as defined in s 2 of the Act like, for example, keeping, concealing, storing, transporting and carrying drugs involve the prerequisite element of possession ... It follows that a person cannot keep, conceal, store, transport, or carry dangerous drugs within the meaning of ‘trafficking’ in the Act without being in possession of them.

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[29] However, in the instant appeal, the act of manufacturing does not require the act of possession to be proved in order to constitute trafficking in s 2 of the Dangerous Drugs Act 1952. The reason is obvious which we will deal with now.

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[30] Gleaning from the entire evidence, we hold that when the learned trial judge at the end the prosecution case amended the charge to one of trafficking by way of manufacturing under s 39B(1)(a) of the Dangerous Drugs Act 1952, there is certainly no necessity for the learned trial judge to first make an affirmative finding of possession.

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[31] At the risk of repeating, it is significant to remember that for an offence of trafficking by way of manufacturing, generally the law does not impose an obligation on the prosecution to prove possession of the impugned drugs to constitute ‘trafficking’ within the meaning of s 2 of the Dangerous Drugs Act 1952. Thus, the prosecution can rely primarily on direct evidence of trafficking to prove their case against the accused on the amended charge as there are no presumptions in s 37 of the Dangerous Drugs Act 1952 thereof to facilitate proof of that fact or the requirement to prove the existence of possession. Hence, we find that the learned trial judge had not committed any appealable error in his decision for failing to make a definite finding of possession when he ordered the accused to enter their defence on the amended charge. Upon subjecting the entire evidence, we are satisfied that the first, second and third accused had failed to exonerate themselves from their involvement in the trafficking of the impugned drugs.

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[32] As decided by authorities, most of the acts of trafficking, other than buying, selling, manufacturing and supplying, would invariably involve the essential element of possession of the dangerous drugs. In the case of *Lee Boon Siah* (affirmed by the Federal Court on 26 January 2015 in *Lee Boon Siah & Ors v Public Prosecutor* (Criminal Appeal No 05–182–08 of 2013) (unreported), the facts showed that all the five appellants were jointly charged and tried

together for trafficking in 29,460.17g of methamphetamine with common intention, an offence in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 read with s 34 of the Penal Code. They were arrested at the factory, which is said to be a drug manufacturing setting and clandestine drug laboratory.

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[33] The Court of Appeal found that the appellants were working at the said factory premise and that they are not there by accident. Though there was no eye witness who say that any of the appellants were in the act of manufacturing, there were pieces of evidence that incriminated the appellants. Chemical materials and other items that are needed to produce methamphetamine were discovered. The clothes they were wearing had stains of the same drugs found. Toothbrush, canned food, instant noodles, pillows and blankets were found. These show that the appellants was in the said factory during the day and night. All of which lead the Court of Appeal to hold that the appellants were involved in the manufacturing of methamphetamine. They were convicted and sentenced to death.

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[34] The Court of Appeal speaking through Azahar Mohamed JCA (as he then was), in a great detailed judgment held among others as follows:

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[32] For the proper determination of this issue, it must be borne in mind that, as stated in s 2 of the DDA, the term 'manufacture' includes numerous and diverse processes or procedures namely making, producing, compounding, assembling, refining or transformation of the offending drugs. For that reason, in our judgment, unlike for example the act of keeping, concealing, storing, transporting and carrying dangerous drugs which constitute 'trafficking' as defined in s 2 of the DDA that involve the requirement of possession, the manufacturing of dangerous drugs as in the present case does not involve possession (see: *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 and *Public Prosecutor v Mansur Md Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233). In other words, possession of the impugned drugs need not be proven in a case involving 'manufacturing' before the trafficking definition in s 2 of the DDA can be invoked.

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[35] Moving on, in *Keong Gim Chye v Public Prosecutor and another appeal* [2018] MLJU 592; [2018] 1 LNS 592, the appellants were jointly charged and tried in the High Court at Penang with two offences of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read with s 34 of the Penal Code. At the conclusion of the trial, the learned JC found both the appellants guilty and convicted them on both the charges. They were then sentenced to the mandatory death penalty prescribed under the Act. In dealing with the complaint of the offence of trafficking by way of 'manufacturing' the Court of Appeal held that once manufacturing setting is proved, it is no longer incumbent upon the prosecution to prove the element of possession.

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A [36] Kamardin Hashim JCA (as he then was), delivering the grounds of judgment of the court said:

[27] We agree with the learned JC's findings at pp 16–21 of the Appeal Record Volume 1 regarding the same issue which we reproduce below:

B [25] SP2, the chemist, testified that from his examination of the house and the implements and articles found in there, the house were being used to manufacture Methamphetamine and to conduct a 'heroin cutting process' in order to reduce the purity of its content.

...

C [29] From his analysis of the liquid discovered in the apparatus in the rooms, SP2 confirmed they contained amongst others, iodine, chloroform, ethanol, caffeine, diethyl ether, chloroquine and methanol. SP2 said that iodine and phosphorous were some of the ingredients used to produce Methamphetamine. SP2 also said that chloroform, ethanol and methanol were organic reagents needed to produce chemical reaction while caffeine, chloroquine were substances used to add into heroin in order to reduce its purity.

D [30] The above evidence clearly showed that the house was used for the manufacturing of dangerous drugs.

E [33] In *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705, it was held:

F It must be observed that most of the acts that constitute 'trafficking' as defined in s 2 of the Act like, for example, keeping, concealing, storing, transporting and carrying dangerous drugs involve the prerequisite element of possession unlike, for instance, the sale and supply of dangerous drugs which need not necessarily involve possession as demonstrated by *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560. It making, producing, compounding, assembling, refining or transformation of the offending drugs. For that reason, in our judgment, unlike for example the act of keeping, concealing, storing, transporting and carrying dangerous drugs which constitute 'trafficking' as defined in s 2 of the DDA that involve the requirement of possession, the manufacturing of dangerous drugs as in the present case does not involve possession (see: *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 and *Public Prosecutor v Mansur Md Rashid & Anor* [1996] 3 MLJ 560; [1997] 1 CLJ 233). In other words, possession of the impugned drugs need not be proven in a case involving 'manufacturing' before the trafficking definition in s 2 of the DDA can be invoked.

H [37] From a distillation of the above-mentioned authorities, unlike those cases which involve the act of keeping, concealing, storing, transporting and carrying dangerous drugs which constitute 'trafficking' as defined in s 2 of the DDA that involve the requirement of proving possession, in the case of manufacturing under s 2, it is unnecessary for the prosecution to prove possession. In any event, possession could be inferred from the circumstances of the instant case.

I [38] What is evident from the facts of the case, was that there was no one else besides both accused who were in the house at the time of the raid by the police. The prosecution evidence also indicated that at the time of the raid, the first accused was

seen running downstairs and toward the direction of the back door while the second accused was arrested while trying to escape from the upstairs balcony.

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[39] The forensic evidence which revealed DNA profiles consistent with both accused persons on a face mask, towel and jeans found at the house further established their presence at the house. The fact that there was no forensic evidence found on other items for example, fingernails clippings did not prejudice the prosecution case in the light of the other overwhelming evidence.

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[40] There were various equipment and instruments for manufacturing drugs found in the rooms upstairs. Drugs of various types were also found there. The chemist, SP2, visited the house on 13 May 2011 at around 5.10pm and carried out an examination of the house. He confirmed that the house was used to process methamphetamine and to 'cut' the drugs which is a process used to dilute the thickness of Heroin.

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His Lordship then continued:

[28] Once manufacturing setting is proven, it is no longer incumbent upon the prosecution to prove the element of possession as was decided in *Chia Leong Foo*. In *Lee Boon Siah & Ors*, this court reiterates the position in *Chia Leong Foo*, as follows: ...

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[31] It is true, as argued by learned counsel for the all the accused persons, that there was no eye witness who saw any of the accused persons in the act of making, producing, compounding, assembling or refining the impugned drugs. Still in our judgment, even without the evidence, there were a number of pieces of evidence as we have enumerated above that incriminated all the five accused persons in the commission of the offence. All of which leads us to conclude that all the five accused had knowledge and were involved in the manufacturing of methamphetamine because they were in a drug manufacturing setting in the factory premise. The clothes of all the accused persons, toothbrush as well as canned food and instant noodles were found in the middle room at the lower floor. A total of eight mattresses and pillows were also found. These show that they were in the said factory during the day and night. According to PW5, all the accused persons were in a state of fright and their clothing were in disarray, as if they had just completed carrying out some work. All the five accused persons were working in the said factory premise and that they were not there by accident. They were participants in the making and producing methamphetamine in the said factory. All this admissible circumstantial evidence when taken together, irresistibly and unmistakably lead to the conclusion that the five accused persons were actively involved in the manufacturing of methamphetamine in the said factory. As the Court of Appeal said in *Idris v Public Prosecutor* [1960] 1 MLJ 296; [1960] 1 LNS 40, circumstantial evidence should be such that when you look at all the surrounding circumstances, you find such a series of undersigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion.

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[32] For the proper determination of this issue, it must be borne in mind that, as stated in s 2 of the DDA, the term 'manufacture' includes numerous and diverse processes of procedures namely making, producing, compounding,

- A assembling, refining or transformation of the offending drugs. For that reason, in our judgment unlike for example the act of keeping, concealing, storing, transporting and carrying dangerous drugs which constitute ‘trafficking’ as defined in s 2 of the DDA that involve the requirement of possession, the
- B manufacturing of dangerous drugs as in the present case does not involve possession (see: *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 ; [2000] 4 CLJ 649 and *Public Prosecutor v. Mansur Md Rashid & Anor* [1997] 1 CLJ 233; [1996] 3 MLJ 560). In other words, possession of the impugned drugs need not be proven in a case involving ‘manufacturing’ before the trafficking definition in s 2 of the DDA can be invoked.
- C [37] With respect, this ground of appeal too has no merits.
- [38] However, before concluding on this critical issue of whether possession needs to be proven in a case involving ‘manufacturing’ before the trafficking
- D definition can be invoked, our attention had been drawn to the case of *Chan Wei Loon v Public Prosecutor and another appeal* [2021] 4 MLJ 660; [2021] 6 CLJ 623 which learned counsels had relied heavily on where the Federal Court in overturning the convictions and unanimously acquitted the appellants reiterated that trite law requires a trial judge to firstly consider and make
- E findings vis a vis ‘possession’ in cases where the charge is one of trafficking by way of ‘manufacturing’ under s 39B(1)(a) of the Dangerous Drugs Act 1952, Zaleha Yusof FCJ (as she then was) speaking on behalf of three judges of the Federal Court held as follows:
- F [77] Looking at the DDA 1952 further, the word ‘manufacturing’ or the definition of ‘manufacturer’ under s 2 of the DDA 1952 is used as a verb. Verbs have traditionally been defined as words that show action or state of being. What it means, if a person is charged with manufacturing the dangerous drugs, it is the duty of the prosecution to provide that at the time of the police raid, the Accused person is in action, namely, is engaged in the acts of ‘manufacture’ as defined by s 2 of the
- G DDA 1952 for example, he was in the act of producing or making or refining the drugs. The evidence of such act must be there. This is what happened in *Ong Hooi Beng*, and even *Lee Boon Siab*.
- [78] Generally, we are of the view that possession is an essential ingredient to be proved for manufacturing cases. But of course, there will always be exceptions
- H depending on the facts and circumstances of the particular case. For example, when an accused person is caught giving instruction to others to process the drugs when he himself is not having the drugs on his body or not touching the machine. His presence there is not mere presence but for the purpose of manufacturing the drugs. The nexus is there, or as in the case of *Lim Son Heng*, even though the accused was not caught in action, based on the facts and circumstances of the case, he was still
- I found to be in possession of all things inside the premises.
- [85] We are of the view that where the appellants were actually arrested in this case was extremely important to appreciate, as unlike the factual matrix in *Lee Boon Siab*, it is doubtful whether they actually had control and custody of the items found on the ground floor if they were caught or arrested on the first floor.

[88] In the light of the contradictions inherent in the prosecution evidence, we could not but agreed with learned counsel for the appellants that there was grave doubt on the question of whether the appellants were arrested on the first or ground floor of the said premises and the benefit of the doubt ought to be resolved in favour of the appellants.

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[90] Our view is clear. The case of *Lee Boon Siah*, and the case of *Ong Hooi Beng*, can readily be distinguished from the instant case. In those two cases, the present of the drugs on the appellants' persons was a key element which provided the nexus between the appellants and the preparatory act of processing the drug. In consequence, they were arrested while they were engaging in the act of manufacturing. While in the instant appeal, there were no traces of drugs found on the persons of the appellant at the material time when they were caught. There were also no traces of drugs on their nails or clothes they were wearing then. There was also no evidence of the processing of the drugs found then, not even by the chemist. Therefore, we could not find any nexus between the appellants and the act of manufacturing.

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[95] We could not find any nexus to connect the appellant with the act of manufacturing. To reiterate, in our view, whether or not possession is necessary ingredients to be proven in a case involving manufacturing of dangerous drugs, would depend on the facts and circumstances of a particular case. In this instant appeal based on the facts and circumstances on when and how the appellants were arrested, we were of unanimous view that possession needs to be proven. Unfortunately, the prosecution in our view had failed to do so. The courts below in our view had misdirected themselves by way of non-directions in not considering the ingredient of possession.

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[96] On the totality of the evidence before us, we found that the conviction on the first charge on this ground alone was unsafe. We need not consider the other issues. We therefore allowed the appeal of both the appellants on the first charge and quashed the conviction as ordered by the High Court and affirmed by the Court of Appeal, and set aside the sentence of death. Consequently, we ordered both the appellants to be acquitted and discharged on the first charge.

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[97] On the second charge, for the purpose of appeal before us, the second charge was only against the first appellant. It was the learned trial judge's finding that the premises of the second charge was used to store the drugs I manufactured in the first charge:

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[98] Learned counsel for the first appellant submitted that as premises in for the second charge was purportedly used to store the drugs purportedly manufactured by the first appellant, if the first charge against the first appellant fails, the second charge must also fail and the second charge against the first appellant must be reduced to mere possession.

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[99] We found merit in this argument. Especially so when there were other occupants in the house at the time of the raid. Hence, on the second charge, we quashed the conviction, set aside the sentence of death under sub-s 39B(2) against the first appellant and substituted for an offence punishable under sub-s 12(3) of the

A DDA 1952. After taking into consideration the mitigation put forward by the first appellant, we sentenced the first appellant to imprisonment for a period of five years with effect from the date of arrest.

B [39] In this context, it is significant to emphasise that the Federal Court in *Chan Wei Loon* had acknowledged that possession can be relevant in some manufacturing cases while not in others. The Federal Court held that there has been an exception for manufacturing cases as decided in *Lee Boon Siah*, *Ong Hooi Beng* and *Keong Gim Chye*. In these cases, the court held that there was sufficient evidence to show that the accused persons were participants in the process of manufacturing dangerous drugs.

C [40] In these regards, we find ourselves in agreement with the learned deputy public prosecutor when he submitted that the case of *Chan Wei Loon*'s case is distinguishable and therefore has no application in the present case.

D [41] To recapitulate, in *Chan Wei Loon* the drugs and the apparatus were found on the ground floor. It was unclear whether the appellants were arrested in the first floor or the ground floor. The raiding officer in his police report (D184) stated that the appellants were arrested in the first floor, while the defence's story was that they were arrested on the upper floor. However, during trial, he said that the appellants were arrested on the ground floor. The original charge reads 'Lot 185-1' which was the address of the first floor of the shop house. This address was amended to 'Lot 185' only after the prosecution had called 16 witnesses. The Federal Court held that it was doubtful whether the appellants had possession of the drugs and other apparatus. The apex court had decided as such in light of D184 and the sudden amendment to the charge. Further, there were no traces of drugs found on the appellants at the material time when they were caught.

E [42] However, in the instant appeals, the three accused were arrested while they were engaging in the act of manufacturing. Support for this on-going manufacturing activities of methamphetamine can be found in the testimony of SP1 during the operation and we now reproduced (notes of proceedings dated 27 June 2019, pp 94–95 Vol 2A Records of Appeal, encl 17):

F Saya bersama pasukan serbuan lapan naik ke tingkat atas dan semasa perjalanan ke tingkat tersebut, saya telah mencium bau yang menusuk hidung, bau asid dan bunyi deruman kipas yang sangat kuat di tingkat atas tersebut. Apabila sampai di tingkat atas, saya telah melihat tiga bekas aluminium yang bertangkai berada di atas dapur elektrik yang terpasang dengan keadaan ketiga-tiga bekas aluminium bertangkai itu ada cecair yang sedang mendidih dan saya juga melihat dua kipas besar sedut udara sedang terpasang yang diubahsuai di dinding premis tersebut untuk menyedut udara keluar daripada ruang tamu tingkat atas rumah tersebut.

- Kemudiannya saya melihat dua lelaki berada dalam bilik di bahagian atas itu seterusnya saya terus mengarahkan tangkapan dibuat ke atas kedua-dua lelaki tersebut yang pada masa tersebut saya syaki lelaki warganegara timur tengah dan setelah tangkapan dibuat ke atas suspek. Suspek yang pertama yang ditangkap dibawah dikenali sebagai Balakrishnan, yang ditangkap di bilik pertama tingkat atas Mohd Abassi dan Mohamed Namazi, kedua-dua pada masa tersebut secara lisan Yang Arif, yang ditangkap di bahagian atas. **A**
- Seterusnya saya melakukan pemeriksaan badan tiada barang salah dijumpai dan saya seterusnya menjalankan pemeriksaan yang menyeluruh di tingkat atas tersebut yang mana di ruang tamu tingkat atas tersebut saya telah jumpai pelbagai peralatan dan juga termasuk bahan kimia yang mana rampasan yang saya buat di tingkat atas itu saya tandakan sebagai A di setiap item yang luar seterusnya kotak saya telah tandakan sebagai A1 sehingga A61 Yang Arif. **B**
- Semua item yang berada di kawasan ruang tamu di luar bilik dan di ruang tamu tersebut juga saya tandakan ke atas tandaan L yang mana L1 hingga L5 adalah melibatkan kepada bekas aluminium yang mempunyai cecair yang mendidih dan L1A merujuk kepada dapur elektrik yang sedang terpasang. Seterusnya bekas kedua saya tandakan sebagai L2, dapur elektrik L2A dan bekas aluminium bertangkai L3, dapur bertangkai L3A. Seterusnya L4 saya tandakan pada satu bekas plastik/tong besar warna biru, satu bekas plastik besar bertudung hijau yang dalamnya mempunyai cecair disyaki dadah jenis syabu anggaran berat 150.4 kg Yang Arif. L5 saya tandakan pada bekas biru bertudung biru juga mempunyai cecair disyaki dadah jenis syabu anggaran berat 120.10kg, seterusnya saya membuat pemeriksaan dalam bilik yang tangkap suspek yang disyaki warganegara timur tengah tadi. **C**
- D**
- E**
- [43]** SP4, testified and we now reproduced (notes of proceedings dated 21 March 2019, pp 20–21 Vol 2A Records of Appeal, encl 17): **F**
- TPR: Boleh puan maklumkan apa dapatan yang puan boleh buat hasil pemeriksaan dan tempat kejadian ini puan.
- SP4: Saya dapati di premis tersebut bahan-bahan dan juga kelengkapan yang ada disitu adalah kelengkapan dan bahan-bahan yang kebiasaannya digunakan untuk memproses dadah methapathime, Yang Arif. **G**
- Mahkamah: Ok
- TPR: Dan dapatan puan berdasarkan apa puan.
- SP4: Dapatan saya adalah berdasarkan analisa saya dan penglihatan saya Yang Arif. **H**
- TPR: Dan puan maklumkan hasil pemeriksaan puan seperti Perenggan 11 puan maklumkan terdapat cecair hidroklorik asid. Saya rujuk kepada Perenggan 11A-1. Ada juga cecair toluene. Betul.
- SP4: Betul Yang Arif. **I**
- TPR: Ada juga red phosphorus, manik yang berwarna putih iaitu sodium hidroksid asidton, selain daripada asid hidroklorik dan juga kesan methapathime. Boleh puan terangkan apa fungsi untuk setiap cecair dan juga manik putih sodium hidroksid, satu persatu. Boleh.

- A** SP4: Asid hidroklorik, toluene, red phosphorus, dan sodium hidrosida dan juga aseton digunakan untuk memproses bahan asas P-2P untuk menjadi methamphetamine, Yang Arif.
Mahkamah: Apa dia?
- B** SP4: Phenyl-2-Propanone, Yang Arif. Mahkamah: Ini adalah bahan asas untuk methamphetamine.
SP4: Ya, Yang Arif
- C** [44] Stretching the matter a little further, SP4 during cross-examination had this to say:
SP4: ... bagi saya bahan kimia dan juga peralatan yang ada di situ telah mencukupi untuk menyatakan bahawa premis tersebut digunakan untuk memproses dadah methamphetamine Yang Arif.
- D** TPR: Cukup untuk apa puan.
SP4: Telah mencukupi untuk menyatakan bahawa tempat tersebut digunakan untuk memproses dadah methamphetamine Yang Arif.
- E** [45] To sum up, based on the evidence, facts and circumstances of the instant case, it is crystal clear that the present appeals fall under the exception as decided in the case of *Chan Wei Loon*. Far from casting any doubt that there existed nexus between the accused and the act of 'manufacturing', evidences presented clearly shows that the three accused were involved in trafficking the drugs in question.
- F** [46] Regarding common intention, we accept that it is virtually impossible to directly prove a pre-arranged plan between the accuseds. Common intention is a question of fact. The proof of common intention is the matter of inference from the circumstances. It is derived from the conduct of the three accused.
- G** This inference of their involvement in the manufacturing of methamphetamine in the said factory can be gathered when the three accused were seen together before the premises were raided. They were not there by accident or coincidence. The three accused were arrested at the premise. There was more than credible evidence that can be inferred that the three accused
- H** acted in concert or were participant in the manufacturing setting of methamphetamine in the said factory. All these acts when combined together proved the nexus between the three accused persons and the dangerous drugs exhibits seized. With the noticeable odour of chemicals and the running of the fans firmly establishes not only knowledge but also a common intention of the
- I** three accused to manufacture the drugs. We are with the learned trial judge.
- [47] There are many celebrated cases in this area of the law. Suffice for us to refer to a few leading local authorities. Way back in 1983, Hashim Yeop A Sani J (as he then was) in *Dato Mokhtar bin Hashim & Anor v Public*

Prosecutor [1983] 2 MLJ 232 at p 267; [1983] 1 CLJ 138; [1983] CLJ Rep 721 at p 749 held as follows:

Under s 34 of the Penal Code, to succeed the prosecution must prove that the criminal act was done in concert pursuant to the prearranged plan or arrangement. In practice it is of course difficult to produce direct evidence to prove the intention of an individual. In most cases, however, it can be inferred from his act or conduct or other relevant circumstances of the case. (see *Mahbub Shah v King Emperor* [1945] 72 IA 148, 153).

Then, His Lordship continued:

Thus, it is clear that the leading feature of s 34 of the Penal Code is the element of participation in action. Two preliminary elements are in fact necessary to fulfil the requirement of s 34. First, there must be evidence (direct or by inference) the Accused was present at the scene of the crime. Secondly, there must be evidence to show that there was prior concert or prearranged plan involving the Accused. This is logical because how can there be participation without physical presence. Even passive participation may require physical presence.

[48] In somewhat similar situation, the Supreme Court in (1) *Namasiyiam* (2) *Rajindran* (3) *Goh Chin Peng*, and (4) *Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336; [1987] 1 CLJ 540 speaking through Syed Agil Barakbah SCJ (as he then was) set out the law to be applied on the question of common intention. The words still ring in our ear where His Lordship said (at pp 344–345 (MLJ)):

In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the Accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention.

Where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused. (see the Supreme Court (of India) on Criminal Law 1950–1960 by JK Soonavala p 188 to 193).

[49] The accused further complained that no DNA, fingerprint evidence or traces of drugs were found on either accused. It was argued that these essential facts are confirmed by the prosecution which show the absence of link between the accused and the impugned drugs. With respect, we are constrained to say that the argument is entirely fallacious. In whatever way one look at it, it does seem a little bit far-fetched. It is salutary to emphasis here that DNA, fingerprint lifting or even traces of drugs are only corroborative in nature when

- A all other overwhelming evidence of manufacturing are proven. Here again, as we have indicated, there is ample evidence connecting the three accused with the commission of the offence rendering the forensic evidence to be of little relevant.
- B [50] In *Yeo Kwee Huat v Public Prosecutor* [2011] 5 CLJ 630, the Court of Appeal speaking through Sulaiman Daud JCA (as he then was) held as follows:
- C [31] Adalah tidak dipertikaikan bahawa kotak kek P13 dan kedua-dua bungkusan plastik asal dadah yang dipersoalkan (P14A dan P14B) telah dihantar untuk pengesanan cap jari tetapi tiada penimbunan cap jari yang positif dikesan pada ekshibit-ekshibit tersebut. Atas alasan ini, peguam terpelajar perayu menghujahkan ketiadaan cap jari pada ekshibit-ekshibit tersebut turut menjejaskan kes pendakwaan. Kami mendapati tiada merit mengenai penghujahan sedemikian. Tujuan untuk menimbulkan cap jari pada sesuatu ekshibit adalah untuk menentukan identiti pesalah atau orang yang pernah mengendalikan ekshibit tersebut. Dalam kes sekarang ini tidak dipertikaikan bahawa semasa ditahan perayu sedang membawa beg P15 yang di dalamnya terdapat kotak kek P13 yang mengandungi dadah yang dipersoalkan. Oleh itu tiada keraguan bahawa dia mempunyai jagaan dan kawalan ke atas beg serta kotak kek dan dadah yang terkandung di dalamnya. Setelah elemen jagaan atau kawalan ini terbukti, maka anggapan di bawah s 37(d) terpakai bagi menunjukkan milikan atau pengetahuan. Oleh itu kami mendapati ketiadaan kesan cap jari pada ekshibit-ekshibit tersebut tidak langsung menjejaskan kes pendakwaan, lebih-lebih lagi setelah menolak watak 'Peter' yang dikatakan oleh perayu orang yang memasukkan kotak kek tersebut ke dalam begnya.'
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- F [51] In *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 at p 575, Chong Siew Fai CJ (Sabah and Sarawak) had the occasion to say the following:
- G Where the identity of a culprit is in question or is required to be proved, fingerprint evidence will be of a great significance and immense value. In the present case under appeal, however, the charge alleged trafficking in the form of a 'sale' and there was evidence indicating the identities of the alleged offenders and the sale transaction. Fingerprint evidence on the newspaper wrapping, white plastic and the loytape, therefore, assumed little value or significance.
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- I [52] In *Ong Hooi Beng & Ors v Public Prosecutor* [2015] 3 MLJ 812, the appellants were charged for manufacturing of dangerous drugs read with s 34 of the Penal Code. They were arrested during a raid at a factory suspected to be used as a clandestine drug processing laboratory. At the time of their arrest, all of them were inside the factory where the drugs and drugs manufacturing apparatus were found. Further, traces of methamphetamine were found on the appellants' clothing. The Court of Appeal found that the evidence indicated the appellants' active involvement in processing the drugs at the factory.

[53] There is one last point which we should deal and this arose from the accused persons concerns that the learned trial judge had misdirected himself when he failed to adequately appreciate the defence of the accused which was given under oath. We find it difficult to accept the criticisms levelled towards the learned trial judge evaluation of the defence evidence. A scrutiny of the said judgment revealed that he had judicially considered the defence advanced by the accused persons and weigh all their evidence before coming to a definite finding of fact. The learned trial judge had not run foul of the principles of law as laid down by the Supreme Court in *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073, which requires no repetitions. With respect, we are not persuaded by such argument.

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[54] Furthermore, it is clear from the judgment that he had addressed his judicial mind to the defence, placed significance emphasis to it, meticulously considered their versions and adequately explained why he chose to disbelieve the evidence of the defence. Even after giving due appreciation at the defence evidence, the learned judge had no slightest doubt that the accused were at the premise throughout the night and until the time the police raided the place and were involved in the manufacture of methamphetamine. He found the explanation of the three accused unacceptable. That is a definite finding that the trial judge made. Again, on the facts and evidence analysed by the learned trial judge, we do not see how he can be said to be wrong. The learned trial judge was right when he finally makes a strong finding of fact that the defence was merely a mere denial and has not been able to raise any reasonable doubt in his mind. In this kind of situation, we are very mindful of our limitation sitting on an appellate capacity reading the record and without the benefit of oral testimony.

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[55] It is trite that credibility of a witnesses is within the domain of a trial judge (see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 267 at p 275; [1983] 1 CLJ 138; [1983] CLJ Rep 721; *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2015] 2 MLJ 293 at p 313; *Adiswaran all Tharumaputrintar v Public Prosecutor and other appeals* [2014] 3 MLJ 228; and *Md Zainudin bin Raujan v Public Prosecutor* [2013] 3 MLJ 773 at p 787).

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[56] On the approach to be taken in dealing with the credibility of a witness, the Court of Appeal in *Ong Hooi Beng & Ors v Public Prosecutor* speaking through Abdul Rahman Sebli JCA (as he then was) held as follows:

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[29] In other words the learned trial judge disbelieved the appellants claim that they did not know they were processing drugs. Undoubtedly this is a finding of fact that is dependent on the trial judge's assessment of the appellants credibility as witnesses, which is primarily a matter for the trial judge: *Watt or Thomas v Thomas* [1947] AC

A 484 at p 487 *Antonio Dias Caldeira v Frederick Augustus Gray* [1936] 1 MLJ 110 at p 111.

B [30] Having had the audio-visual advantage of seeing and hearing the appellants while they gave evidence, the learned trial judge was in the best position to assess their credibility and reliability, and certainly not us at the appellate stage who only have the benefit going through their evidence in cold print. It is true that the present day technology allows us to capture court proceedings so that we can always play back the audio-visual recordings to see for ourselves how the witnesses behaved or reacted to certain questions, but there is no substitute for seeing and hearing them first hand and in real time.

C [31] To entitle us to overturn the trial courts finding under such circumstances and substitute it with our own finding that the appellants were actually credible witnesses and that the belief that they entertained was in fact reasonably true, the burden is on the appellants to show that the finding is perverse and that the learned trial judge had failed to take proper advantage of his having seen and heard them giving evidence. We are not satisfied that the appellants have discharged that burden. In *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 243; 104 LJB 304; 152 LT 563; 79 Sol Jo 179; 51 TLR 289 Lord Wright in dealing with a similar issue said:

E Two principles are beyond controversy. First it is clear, that, in an appeal of this character, that is from the decision of a Trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal must, in order to reverse, not merely entertain doubts whether the decision below is right, but must be convinced that it is wrong.

F [57] Now, that the above key issues are settled and put to bed, we find it no longer necessary to dwell on the other ancillary issues (if any) submitted in the course of the respective submission by all parties. Our views on them would have no effect on our finding.

G CONCLUSION

H [58] Having deliberated on the entire defence evidence, we unanimously are of the view that the three accused has failed to raise a reasonable doubt in the prosecution case, their version were unbelievable and inconsistent with their innocence. This is especially so where the findings of facts rest upon the substratum of oral evidence, the credibility of which is entirely for the learned trial judge to decide. For the reasons discussed, we find no real substance in this appeal to merit our interference. The evidence against the three accused was so clearly overwhelming. The conviction against the three accused is therefore safe. The appeal against conviction is dismissed.

I [59] On sentence, with the Abolition of Mandatory Death Penalty Act 2023 (Act 846) which came into effect on 4 July 2023, the court may consider the mitigating and aggravating factors in the exercise of its discretion in

determining the appropriate sentence with either death by hanging or life imprisonment with whipping of not less than 12 strokes. Having considered the facts of the case, the element of public interest, the enormous quantity of the drugs manufactured, the mitigation by learned counsel on behalf of the three accused persons and the call by the learned deputy public prosecutor to impose the death penalty, we find that the aggravating factors outweighs the mitigating factors. Hence, the sentence meted out by the learned trial judge is affirmed as it commensurate with the offence committed.

Appeals dismissed.

Reported by Dzulqarnain Ab Fatar

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